NO. 81-65

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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ALEXANDER L. STEVAS,
CLERK

JOHN M. BEELER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR CERTIORARI - CRIMINAL CASE

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QUESTIONS PRESENTED

I. Was Petitioner deprived of a fair trial by an impartial jury by reason of the various actions taken and the supplemental Allen charge given by the Trial Court after the jury had reported it was "hopelessly deadlocked"?

II. Did the Trial Court's refusal to permit petitioner's counsel the right to inspect a post-trial letter, which a juror mailed to the Trial Judge, violate Petitioner's Sixth Amendment right to the assistance of counsel?

III. Does a fatal variance-constructive amendment exist between the facts alleged in the indictment and the proof introduced at trial?

IV. Does the Government's evidence support the charge of extortion under the Hobbs Act, 18 U.S.C. §1951?

V. Is Petitioner's conviction barred by the Statute of Limitations as provided in 18 United States Code, §3282?

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

OPINION BELOW

The Opinion of the Court of Appeals for the Sixth Circuit (Appendix, *infra*, p. A-19) has not yet been reported.

JURISDICTION

The Judgment of the Court below was entered on May 20, 1981. An order was entered staying the mandate until

July 15, 1981. The jurisdiction of this Court is invoked under 28 United States Code §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. The statute under which Petitioner was prosecuted was 18 United States Code §1951, known as the "Hobbs Act", which provides in part as follows:

§1951:

"(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

* * *

(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right."

2. The statute of limitations which Petitioner contends bars his prosecution is 18 United States Code §3282, which provides as follows:

§3282. *Offenses not capital*

"Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or

punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed."

3. The Sixth Amendment, United States Constitution, provides, in material part:

"In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury . . . and to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

A. *Course of Proceedings*

On June 17, 1977, Petitioner was convicted of thirty-five (35) counts of obstructing, delaying, and affecting commerce by extortion, in violation of 18 United States Code §1951, commonly known as the "Hobbs Act." On November 30, 1978, the Court of Appeals for the Sixth Circuit reversed the conviction based on a constructive amendment-variance of the indictment. *United States v. Beeler*, 587 F.2d 340 (6th Cir. 1978). (App. at A-1)

Petitioner was reindicted (App. at A-11) on a one (1) count indictment, and on June 19, 1980, was found guilty of extortion under the Hobbs Act. Petitioner was sentenced to four (4) years in custody and fined Two Thousand Dollars ($2,000.00). This conviction was affirmed by the Court of Appeals for the Sixth Circuit on May 20, 1981. (App. at A-19)

B. *Relevant Facts*

Petitioner, from 1970 through 1977, was the Commissioner of Welfare for Knox County, Tennessee. Petitioner,

along with the Commissioner of Finance and Commissioner of Highways comprised the three (3) person Knox County Board of Commissioners. Petitioner was an official of the County of Knox, and in no manner associated with the City of Knoxville, a separate governmental entity.

Browning Ferris Industries (herein called "BFI") collects residential and commercial refuse within and without the corporate limits of Knoxville, Tennessee. As a result of action taken by the Tennessee Legislature, one (1) city used landfill and one (1) county used landfill were to close on July 1, 1972. The County of Knox, a separate governmental entity, had made arrangements to dump its refuse in an adjacent county. However, the City of Knoxville, through its mayor, sought the necessary approval of the Knox County Board of Commissioners to locate a landfill within Knox County.

BFI's general manager, Robert Kenneth Vann (herein called "Vann"), testified, under a grant of immunity, that pursuant to a July 4, 1972, agreement, he paid Petitioner Twenty Thousand Dollars ($20,000.00) in cash on July 6, 1972, and made a promise of future cash payments in return for Petitioner's favorable vote on the landfill proposed by the City of Knoxville. On July 10, 1972, the Board of Commissioners unanimously approved a landfill for the City of Knoxville. The City of Knoxville thereafter contracted with BFI to permit its use of the landfill, the exclusive control of which was exercised by the City of Knoxville. Vann testified that on July 11, 1972, he paid Petitioner an additional Ten Thousand Dollars ($10,000.00); and that once a month between January 1, 1973, and November, 1975, he would cause a BFI check in the amount of Two Thousand Five Hundred Dollars ($2,500.00) to be made payable to cash, convert the check to cash, and deliver same to Petitioner.

Petitioner testified that he first personally met Vann some months after the landfill was approved and that they thereafter became friends. He testified that, in the following years, the most he received from Vann was campaign contributions of approximately $3,000.00 to $4,000.00 and loans of approximately $5,000.00 to $6,000.00, none of which was related to his vote on the landfill. Vann, without mentioning specific amounts which he subsequently testified to, advised Petitioner that BFI had made certain disclosures to the Securities Exchange Commission, and that Petitioner should contact an attorney. Petitioner's attorney testified that he, based upon Vann's allegations, was concerned that an Internal Revenue investigation would ruin Petitioner politically, and that he advised Petitioner to amend his 1973 through 1975 federal income tax returns to include the amounts Vann claimed to have given him. The attorney also testified that Petitioner had strongly objected to this, denying that he had received the payments.

A certified public accountant who audited the records of BFI in 1973 reported that Vann had told him the Two Thousand Five Hundred Dollar ($2,500.00) monthly payments were paid to "various persons in *city* government . . . for allowing (BFI) to use the city's landfill." (Emphasis added) Petitioner was a Knox County official with no connection with the City of Knoxville.

Among other witnesses, a certified public accountant testified for Petitioner. By use of a "source and application" analysis it was his opinion that Petitioner did not have use of the funds Vann testified were paid.

The moment the Board of Commissioners approved the zoning of the landfill site, the landfill came under the complete dominion and control of the City of Knoxville, and Petitioner had no power or control over it. At the

time Vann allegedly began the series of monthly payments, six months after the vote, he *knew* Petitioner did not have the ability to affect BFI's rights with respect to the landfill. He testified that the payments were made for the purpose of honoring a "gentlemen's agreement" of July 4, 1972. At no time did Vann testify that the monthly payments were made with the "reasonable belief" that Petitioner's office included the power to affect BFI's use of the landfill.

The jury heard approximately four (4) days of testimony, including numerous events elicited by Petitioner in support of his theory that if the immunized witness, Vann, had in fact paid any money, it was to persons in the City of Knoxville having control over the landfill rather than to Petitioner who had no control or influence over the operation of the landfill.

The jury, after approximately seven (7) hours of deliberation on Tuesday, June 17 (from 12:45 p.m. until 7:42 p.m.), stated it did not wish to deliberate further that night. The jury began deliberations again on Wednesday, June 18, 1980, at 9:05 a.m., at which time it was advised that there was no time limitation for reaching a decision. The jury continued its deliberations, except to briefly appear in court at 12:45 p.m., for an answer to questions submitted to the Court, until a short time before 5:05 p.m.

Shortly prior to 5:05 p.m., after some fifteen (15) hours of deliberation, the jury, on its own volition, and without inquiry by the Court, communicated in writing that it was "hopelessly deadlocked".

The Court, having advised counsel of the "hopelessly deadlocked" note from the jury and the plan to instruct the jury to continue to deliberate and to thereafter give a supplemental instruction, refused to grant a mistrial or to recognize the validity of Defendant's insistence that "any

instruction from the Court or any further deliberations or instructing them to deliberate is coercive at this point."

The "hopelessly deadlocked" note to the Court was treated in the following manner:

"THE COURT: Bring in the jury.

(The jury returns.)

Clerk, call the roll.

(Whereupon, the roll was called.)

Ladies and Gentlemen, I have received a note from the jury as follows: 'We are hopelessly deadlocked.'

Your supper, ladies and gentlemen, is on the way. It should be here in a short while.

So, I am going to ask that you return to the jury room and continue your deliberations.

You may return to the jury room to continue your deliberations.

Clerk, file the note.

The Court will stand in recess.

5:05 P.M."

The jury, as instructed, did return to its deliberations. Some two and one-half (2-1/2) hours later, at 7:30 p.m., the jury was still deadlocked. The Court thereupon inquired of the jury foreman, "Do you believe the jury will be able to reach a verdict within the next five minutes?" The foreman answered, "No, Sir".

The Court thereupon excused the jury for the day with the following remarks:

"THE COURT: All right. Ladies and gentlemen, you have worked a very long day, and I am going to, at this time, let you go home and *sleep* on this case. Tomorrow morning I am going to request that you return. I will have some further brief instructions for you tomorrow." (Emphasis added.)

The following morning, the third day of the jury's deliberations, the Trial Court, again over objection, gave supplemental instructions, which can best be described as a "modified *Allen* charge."

Approximately ten (10) sequestered hours later, for a total of twenty-eight (28) hours of deliberations, the jury reported a verdict of guilty.

Before Petitioner was sentenced, one of the jurors mailed a letter to the Trial Judge. Upon receipt of the letter, the Trial Judge entered an ex parte order revealing that the letter discussed "the deliberative process which took place before the jury handed down its final verdict of guilty", but denied counsel the right to inspect the letter. Petitioner moved to permit counsel to inspect the letter to make an independent determination as to whether or not the contents suggested any allegations of extraneous or outside influence, or misconduct or incompetence on the part of any juror, or any other subject which would suggest or demand that counsel take further action in their representation of Petitioner. This motion was overruled. The Trial Court cited as reasons therefor that (1) disclosure of the letter "will serve no useful purpose," (2) disclosing the letter to defense counsel "could result in *post hoc* rationalizations, controversy, and juror harrassment," and (3) that the letter suggested "no avenues of investigation which might produce admissible evidence." (App. at A-16)

The Trial Court sealed the letter and made it a part of the record in the Court of Appeals. The Court of Appeals, in its opinion, without giving counsel the right to inspect the letter, reviewed the letter, and affirmed the Trial Court's order. (App. at A-20) To this very moment, counsel has been denied the right to see this letter.

REASONS PROPOUNDED FOR GRANTING THE WRIT OF CERTIORARI

ISSUE NO. I

WAS PETITIONER DEPRIVED OF A FAIR TRIAL BY AN IMPARTIAL JURY BY REASON OF THE VARIOUS ACTIONS TAKEN AND THE SUPPLEMENTAL *ALLEN* CHARGE GIVEN BY THE TRIAL COURT AFTER THE JURY HAD REPORTED IT WAS "HOPELESSLY DEADLOCKED"?

ARGUMENT

The Sixth Circuit Court of Appeals, in approving the use of a modified *Allen* charge, under the circumstances of this case, rendered a decision in conflict with other federal courts of appeal.[1] Petitioner submits that this Court should settle this issue so as to create uniformity among the Circuits. In addition, the giving of the supplemental charge, under the attendant facts and circumstances of this case, was unduly coercive and violative of Petitioner's Sixth Amendment right to trial by an impartial jury. (See text of the charge at page A-14 of the Appendix.) It is submitted that this Court should exercise its supervisory powers to remedy the prejudice to Petitioner from an unfair trial.

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[1] A chart revealing the present status of the Allen charge in all circuits is contained in the Appendix at page A-22.

The supplemental instruction given was a modified *Allen* charge with language requiring the jurors in the minority to reconsider their positions, similar to that utilized in *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970). That language is as follows:

> ". . . Each juror who finds himself or herself to be in the minority should *reconsider* his or her views in the light of the opinion of the jurors of the majority.
>
> Conversely, each juror finding himself or herself in the majority should give *equal consideration* of the views of the minority."

(App. at A-15) (Emphasis added)

It is the requirement that a juror reconsider his or her position in light of the majority's position that caused the Court of Appeals in the Third Circuit, in *United States v. Fioravanti*, 412 F.2d 407 (3rd Cir. 1969)[2] to hold that:

> "Hereafter, in this circuit, trial judges are not to give instructions . . . that direct a juror to distrust his own judgment, if he finds a large majority of the jurors taking a view different from his."
>
> 412 F.2d at 420.

Petitioner contends that the "reconsideration" language approved in the Fourth Circuit, and given in this case, is in conflict with the approved charge in the Third, Seventh[3] and District of Columbia[4] Circuits. These three Circuits

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[2] The Court in Fioravanti recommended that "if there is any disposition to instruct jurors to consult with others" that the charge from "Federal Jury Practice and Instructions," Mathes and Devitt, 1965, §79.01 be used. See text of this charge at page A-21 of Appendix.

[3] United States v. Silvern, 484 F.2d 879 (7th Cir. 1973)

[4] United States v. Thomas, 449 F.2d 1177 (D.C. Cir. 1971)

have adopted the American Bar Association Standard §5.4, and have disdained the *Allen* charge.

The language in question is coercive only to the minority jurors. The Court clearly instructed the jurors in the minority to "reconsider" their views. The Court did not similarly instruct the majority. Rather, the Court said the majority should give "equal consideration" of the views of the minority. If the Court had intended each side to "reconsider", the Court surely could have used the same instructional language. The word "reconsider" is clearly more direct and expressive than "equal consideration".

To argue that "reconsider" and "equal consideration" results in a balanced instruction to the minority and majority is pure sophistry. Common sense dictates that one in the minority, having been told to "reconsider", feels the greater pressure to conform than would one in the majority. Those in the majority, feeling a blanket of security by reason of their number, naturally feel little, if any, pressure. Accordingly, the jury, with particular directions to the minority, received instructions that "they be influenced by some sort of Gallup Poll conducted in the deliberation room." *United States v. Fioravanti*, 412 F.2d 407 (3rd Cir. 1969).

The basic underlying principle of the *Allen* charge is to consider the point of view of others. Accordingly, even had the supplemental instructions been identical, that is, also requiring the majority to reconsider or distrust their judgment, common sense and human nature dictates the ineffective result of such. In fact, as stated by the Third Circuit Court of Appeals, such would be "an invitation to a frolic with Alice in Wonderland." *United States v. Fioravanti*, 412 F.2d 407 (3rd Cir. 1969).

Petitioner contends that the Court's refusal, under the circumstances here existing, to accept the "hopelessly deadlocked" verdict and declare a mistrial violated his constitutional rights. Petitioner further submits that the guilty verdict, under the circumstances here existing, was the direct result of the coercive and prejudicial actions of the Court, including the supplemental *Allen* charge.

The Sixth Circuit has long recognized that the "possibility of disagreement by the jury is a part of the jury system." *United States v. Harris*, 391 F.2d 348, 355 (6th Cir. 1968).

The *Harris* case, recognizing the constitutional nature of that right, stated that:

> ". . . the possibility of disagreement by the jury and the lack of unanimous verdict is a protection conferred upon a defendant in a criminal case by the Constitution." 391 F.2d at 355.

The written statement of the jury that it was "hopelessly deadlocked" was in fact one of three possible verdicts in any criminal case and the Court constitutionally erred in not accepting same, particularly after it was reached following some fifteen (15) hours of deliberations.

The Sixth Circuit case of *United States v. Scott*, 547 F.2d 334 (6th Cir. 1977), in discussing the *Allen* charge, reinforces the permissible result of jury disagreement by the following language:

> ". . . a defendant has a right to rely on the fact that an ultimate jury disagreement is a permissible result of a trial." 547 F.2d at 337.

The rejection by the Court in this case of the "hopelessly deadlocked" verdict of the jury not only denied Petitioner's

constitutional right to rely on jury disagreement, but additionally subjected the delicate jury balance, as indicated by the fact that it had then deliberated fifteen (15) hours without agreement, to undue pressure and coercion, a risk the defendant is not required to take.

The jury, having been advised by the Court that a prior proceeding "did not conclude the matter", was more susceptible to the coercive nature of the modified *Allen* charge as given.

The improper and prejudicial pressure and coercion on the jury continued, following the Court's rejection of its inability to agree, in the form of required continued deliberations and telling the jury 2-1/2 hours after it reported "hopelessly deadlocked", "I am going to, at this time, let you go home and sleep on this case."

The Trial Judge thereupon followed his actions and words with supplemental instructions. Ten (10) hours of continuous deliberations thereafter the jury reached a unanimous verdict. Is it not a very reasonable conclusion that this jury decided, under the circumstances, that the Court expected a unanimous verdict and that the Court was prepared to leave the jury deliberating for such period of time as necessary to reach such a unanimous verdict? Petitioner submits that the jury, in the final analysis, submitted to the pressure and coercion and surrendered to the Court's expectations.

The coercive nature of the supplemental instructions was increased by the language employed by the Court that, "If the jury is unable to agree upon a verdict, the case is left open and undecided. Like all cases it has got to be disposed of sometime." (App. at A-14)

Although the case of *United States v. Harris, supra*, recognized the distinction between "must be disposed of" and "must be decided", the circumstances existing in this case reflect that the jury was aware that a prior trial had not disposed of the matter. The jury in this case, with the above instructions, was coercively reminded that failure to agree would represent the second time the case would be left "open and undecided". This was one of the reasons why the Court in *United States v. Harris, supra*, found the charge to be coercive. As stated by the Court:

> "The charge here was prefaced by the statement that this was the second trial of the case and that another jury had failed to make a verdict." 391 F.2d at 356.

It is submitted that the very language of the so-called "Allen charge" instructions in this case was coercive. However, the cumulative effect of the actions of the Court after the jury reported "hopelessly deadlocked", the supplemental instructions and required continued deliberations was devastating.

The Petitioner can well appreciate the following remarks of the Third Circuit in *United States v. Fioravanti, supra*:

> "Since its approval over seventy years ago, the Allen charge has persisted through the years, not so much an object of commendation as it is a product of toleration. Its continued existence is ostensibly justified as a device to generate verdicts, and thus eliminate hung juries. Laudatory as this rationale may appear on superficial impression, there is, upon serious contemplation, no sound basis to the hypothesis."

Petitioner respectfully submits that the *Allen*-type instruction, as modified by the various Circuits, is a product of toleration and a fertile source of appeals, and should no longer be permitted by this Court.

ISSUE NO. II

DID THE TRIAL COURT'S REFUSAL TO PERMIT PETITIONER'S COUNSEL THE RIGHT TO INSPECT A POST-TRIAL LETTER, WHICH A JUROR MAILED TO THE TRIAL JUDGE, VIOLATE PETITIONER'S SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL?

After the jury returned a verdict of guilty, and before Petitioner was sentenced, a juror mailed a letter to the Trial Judge. The Court entered an ex parte Order holding under Rule 606(b) of the Federal Rules of Evidence, that the letter was inadmissible in any proceedings concerning the validity of the jury's verdict.[5] Under this rule, if the contents of the letter suggested "extraneous prejudicial information"or any "outside influence" brought to bear upon any juror, then the juror could testify at a hearing or inquiry into the validity of the verdict.

Petitioner submits that the Trial Judge's determination that the contents of the letter was inadmissible may

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[5] (b) Inquiring into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

or may not be a correct application of the law to the facts contained in the letter. Petitioner submits that judicial speculation about whether *in camera* materials would be useful to the defense is improper. See *United States v. Moten*, 582 F.2d 654 (2nd Cir. 1978). In that case, during the trial, the Judge interviewed a juror *in camera* regarding a possible jury tampering effort. The juror was excused from further service. The Defendant moved to discover the *in camera* proceedings, but the motion was denied. On appeal, the case was remanded for proceedings with respect to the Defendant's request for discovery, the Court of Appeals stating:

> "It is immaterial that the district judge after an *in camera* examination, of the *in camera* materials, agrees with the government that they contain no facts that would help the Defendant. The Supreme Court has repeatedly disapproved of judicial speculation about whether *in camera* materials would be useful to the defense . . . (citations omitted) If the materials are relevant, the district judge's estimation of their lack of helpfulness does not justify withholding them from the defense." *United States v. Moten*, 582 F.2d 654, 662.

Petitioner submits that the reasons given by the Trial Judge for nondisclosure of the letter to defense counsel are without merit. First, the Court determined that disclosure of the letter "will serve no useful purpose". (App. at A-17) This *ex parte* decision of the Trial Judge assumes that counsel would have been unable to propound any theory or reason which would have required further inquiry into the matter. Such finding has effectively aborted the benefits of the adversary system

to Petitioner, and has denied him the effective assistance of counsel at all stages of the proceedings. Petitioner submits that there is no clear cut, black or white definition of what constitutes "extraneous prejudicial information" or "outside influence." Petitioner submits that reasonable minds might differ as to whether any given set of circumstances or facts might come within the definition.

Another reason given by the Court for refusing to disclose the letter to defense counsel is that it "could result in *post hoc* rationalizations, controversy, and juror harrassment." (App. at A-17) Petitioner submits that these fears could have been dispelled by the Court's revealing the letter to defense counsel *in camera* and then sealing the letter. By utilizing this procedure, defense counsel may or may not have agreed with the Court that the letter suggested "no avenues of investigation which might produce admissible evidence." (App. at A-17) If defense counsel did not so agree, arguments could have been made as to the relief which was deemed appropriate. It such relief was in order, the Trial Court could have so ordered. If the Court deemed it inappropriate, such relief could be denied, and the issue then squarely presented to the Court of Appeals. In any event, the Trial Court would have had the discretion and the power to order defense counsel from publicly disclosing the contents of the letter, or from contacting jurors.

Petitioner suggests that, even though the letter may or may not have contained any information which would be admissible into evidence under Rule 606(b), it very well could have contained information which would be reflective of the coercive nature of the *Allen* charge given by the Trial Judge over Petitioner's objection. Due to the

length of the jury's deliberations, and the fact that the jury had reported itself "hopelessly deadlocked" after fifteen (15) hours, it is suggested that the unsolicited letter from the juror involved matters over which that particular juror had concern. The mere existence of this unsolicited letter strongly suggests that something more than the normal deliberative process affected his or her vote.

It is submitted that the denial of defense counsel's right to inspect the letter casts a shroud of secrecy and distrust over the jury's verdict. The obvious question in Petitioner's mind is if the letter contains nothing "of benefit" to him, why was the letter suppressed?

Petitioner submits that the refusal of the Trial Judge to permit his counsel to inspect the letter has denied him the right to effective assistance of counsel under the Sixth Amendment. The effective assistance of counsel is as vital to our judicial system as a Judge is to the operation of a Court. Yet, in this particular case, the Petitioner has been substantially denied the effective assistance of counsel, with regard to the non-disclosure of the contents of the juror's letter.

ISSUE NO. III

DOES A FATAL VARIANCE-CONSTRUCTIVE AMENDMENT EXIST BETWEEN THE FACTS ALLEGED IN THE INDICTMENT AND THE PROOF INTRODUCED AT TRIAL?

Petitioner was first indicted on January 17, 1977, on a thirty-three (33) count indictment which was dismissed by the government before trial. A second indictment, containing thirty-five (35) counts was returned on April 1, 1977,

which resulted in Petitioner's conviction. (App. at A-8) However, that conviction was reversed by the Sixth Circuit Court of Appeals on the basis that the proof introduced at the trial varied from and expanded upon the facts alleged in the indictment, such that there was a fatal constructive amendment to the indictment. The indictment on which Petitioner was first convicted charged him with receiving thirty-five (35) monthly payments of Twenty-Five Hundred Dollars ($2,500.00) each from January, 1973, through November, 1975. The Government's evidence was that, in addition to the alleged monthly payments, Petitioner made an agreement on July 4, 1972, to cast a favorable vote on the landfill, and that on July 6, 1972, he received a cash payment of Twenty Thousand Dollars ($20,000.00), and another cash payment of Ten Thousand Dollars ($10,000.00) on July 11, 1972. The said indictment did not even mention the agreement nor the Twenty Thousand and Ten Thousand Dollar ($20,000.00 and $10,000.00) payments. Such omissions constituted the basis of the reversal by the Sixth Circuit Court of Appeals. (*United States v. Beeler*, 587 F.2d 340 (6th Cir. 1978).) (App. at A-1)

On March 21, 1979, a third indictment containing one (1) count was handed down. (App. at A-11) Contrary to the admonition of the Sixth Circuit Court of Appeals in *United States v. Beeler*, 587 F.2d 340 (6th Cir. 1978), the third indictment, on which Petitioner stands convicted, *still* did not allege the July 4, 1972, agreement. Proof regarding the July 4, 1972, agreement was introduced, over Petitioner's objection. In its charge to the jury, the Trial Judge stated:

> "He has not been tried as such for any agreement he allegedly entered into on July 4, 1972, but he is being tried for the moneys (sic) which he allegedly obtained pursuant to the agreement."

This non-alleged agreement was the very springboard and crux of the "continuing offense theory" relied upon by the government. It was the catalyst which, if believed, could make all subsequent alleged payments criminal in nature.

Rule 7(c) of the Federal Rules of Criminal Procedure mandates that an indictment "shall be a plain, concise, and definite written statement of the essential facts constituting the offense charged." Additionally, as stated by this Court in *United States v. Russell*, 369 U.S. 749 (1962), the indictment "must descend to particulars." The government's proof was that all of the payments made by Vann were in voluntary compliance with the non-alleged July 4, 1972, agreement. Yet, Petitioner was not under indictment for any agreement entered into on July 4, 1972. Nowhere in the indictment is there any statement charging that the government relied upon the agreement of July 4, 1972, to induce the alleged subsequent payments totalling One Hundred Seventeen Thousand Five Hundred Dollars ($117,500.00). Therefore, the very crux of the government's case was never mentioned in the indictment.

In violation of this Court's holding in *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), Petitioner was deprived of a basic right to be tried only on charges presented in an indictment returned by a Grand Jury.

The Trial Court, in overruling Petitioner's objection to the introduction of evidence of the July 4, 1972, agreement, held that such evidence was admissible under Rule 404 of the Federal Rules of Evidence as showing opportunity, intent, preparation, plan, knowledge, and absence of mistake. This was plain error. Rule 404(b) states that evidence of "other" crimes, wrongs, or acts may be admissible; however, it is obvious that the evidence of

an alleged July 4, 1972, agreement was not evidence of "another" crime, but was an integral and vital part of the very crime for which Petitioner was charged.

ISSUE NO. IV

DOES THE GOVERNMENT'S EVIDENCE SUPPORT THE CHARGE OF EXTORTION UNDER THE HOBBS ACT, 18 UNITED STATES CODE §1951?

The government's proof does not support the charge of extortion; that is, that Petitioner obtained money "under color of official right and through the wrongful use of financial fear and economic injury." In order for a conviction to stand under the Hobbs Act, it must be proven that the payor, at the time of the payments, held a reasonable belief that the payee's office included the ability to affect the payor's rights. See *United States v. Harding*, 563 F.2d 299 (6th Cir. 1977). Vann testified that, during all of the times he alleged made the Twenty-five Hundred Dollar ($2,500.00) monthly payments, he knew the subject landfill was under the full and complete control of a governmental body, the City of Knoxville, over which Defendant had no power or control. He testified that, after the landfill was approved by the Knox County Board of Commissioners, all rights of control and ownership were vested in the City of Knoxville, and that he made the alleged payments to Petitioner based upon a "gentlemen's agreement" of July 4, 1972.

The only evidence upon which the government could sustain this conviction is the alleged thirty-five (35) monthly payments. Although Vann testified that he paid Petitioner Thirty Thousand Dollars ($30,000.00) prior or immediately subsequent to the approval of the landfill, the alleged purpose being to secure Petitioner's vote, it

is clear from the proof that the Thirty Thousand Dollar ($30,000.00) payments were from personal or other funds of Vann, as opposed to the funds of the alleged victim, namely BFI. There was absolutely no evidence introduced that such payments affected commerce. Vann testified, unequivocably, that this was a "personal deal" paid out of personal or other funds, and not the funds of BFI. On the issue of "affecting commerce", the government introduced evidence only that BFI was involved in interstate commerce. There was absolutely no effort made to prove that the payor of the Thirty Thousand Dollars ($30,000.00) was engaged in interstate commerce.

At the time the monthly payments were alleged to have commenced (six months after the landfill vote), Vann was not in fear of economic loss and did not have a reasonable belief that Petitioner could affect his or BFI's rights with respect to the landfill. The elements of extortion therefore have not been proven.

ISSUE NO. V

IS PETITIONER'S CONVICTION BARRED BY THE STATUTE OF LIMITATIONS AS PROVIDED IN 18 UNITED STATES CODE §3282?

The one (1) count indictment on which Petitioner was convicted was returned on March 21, 1979. (App. at A-11) Therefore, Petitioner could not be convicted of any offense unless it was committed during the five-year period between March 21, 1974, and March 21, 1979, unless the statute of limitations had otherwise been tolled. See 18 U.S.C. §3282. *United States v. Grady*, 544 F.2d 598 (2nd Cir. 1976), holds that if an indictment is validly pending, a superseding indictment will not be barred by the statute of limitations, ***if and only if it does not broaden the charges made in the first indictment.*** 544 F.2d at 601.

An examination of the two (2) indictments will reflect the following substantial differences:

(a) The previous indictment on which Petitioner's first conviction was reversed, alleges thirty-five (35) separate acts of extortion for a total amount of Eight-seven Thousand Five Hundred Dollars ($87,500.00). The alleged extortionate events covered the period of January 26, 1973, through November 26, 1975. (App. at A-10)

(b) The one (1) count indictment, on which Petitioner stands convicted, alleges extortion during the period of July 6, 1972, through November 26, 1975, for a total amount of One Hundred Seventeen Thousand Five Hundred Dollars ($117,500.00). (App. at A-13)

Thus, the one-count indictment broadens the charge of the previous indictment by adding approximately six (6) months period of time and an additional Thirty Thousand Dollars ($30,000.00). Without question, the superseding indictment broadened the charges made in the second indictment. Therefore, it is respectfully submitted that all allegations contained in the one-count indictment relating to the period of time prior to January 26, 1973, (the earliest date charged in the previous indictment) are barred by the five (5) year statute of limitations. Thus, the proof regarding the July 4, 1972, agreement (not even alleged in the indictment) was certainly outside the statute of limitations, and cannot be used as the crux of the government's proof, through which all other alleged payments could be rendered extortionate. Also, the alleged payments of Twenty Thousand Dollars ($20,000.00) on July 6, 1972, and the Ten Thousand Dollar ($10,000.00) payment on July 11, 1972, are likewise outside the five (5) year statute of limitations.

Since these items of proof are essential to the government's case, and since the indictment contains only one (1) count, Petitioner has been convicted of offenses occurring outside the five (5) year statute of limitations.

CONCLUSION

For the reasons cited herein Petitioner prays that this Honorable Court exercise its power of supervision and grant the Petition for Certiorari.

Respectfully submitted,

CECIL D. MEEK, JR.
EDWARD L. SUMMERS
Attorneys for Petitioner

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Appendix

NO. 77-5372

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*, v. JOHN M. BEELER, *Defendant-Appellant.*	APPEAL from the United States District Court for The Eastern District of Tennessee, Northern Division

Decided and Filed November 30, 1978.

Before: EDWARDS and PECK, Circuit Judges, and BALLANTINE, District Judge.*

BALLANTINE, District Judge. Defendant, John M. Beeler, was convicted by a jury in the Eastern District of Tennessee for obstructing, delaying and affecting commerce by extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (1976).[1]

* Honorable Thomas A. Ballantine, Jr., Judge of the United States District Court for the Western District of Kentucky, sitting by designation.

[1] 18 U.S.C. § 1951 (1976) provides in part:

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section—

• • •

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

[2]

Beeler, as Knox County Commissioner of Welfare, allegedly extorted payments from Robert Kenneth Vann, manager of Browning-Ferris Industries of Knoxville, Inc. (BFI). We reverse.

The voters of Knox County, Tennessee, elected Beeler their Commissioner of Welfare in 1970 and reelected him in 1974. The Knox County Board of Commissioners is composed of three elected officials: The Commissioners of Finance, Highways, and Welfare.

BFI collects residential and commercial refuse in Knoxville and in Knox County outside of Knoxville. As a result of action taken by the Tennessee Legislature, two Knox County landfills used by BFI were to close on July 1, 1972. Knox County made arrangements to dump its refuse in an adjacent county. The City of Knoxville, however, sought the approval of the Commissioners for a landfill within Knox County. By statute, the use of any landfill in Knox County requires approval of the Board of Commissioners.

Vann testified under a grant of immunity that he paid Beeler $20,000 in cash on July 6, 1972, and made a promise of future payments in return for Beeler's favorable vote on the proposed landfill. On July 10, 1972, the Board of Commissioners unanimously approved a landfill for use by the

City of Knoxville. Vann further testified that on July 11, 1972, he paid the defendant an additional $10,000; and that once a month between January, 1973, and November, 1975, he would cause a BFI check to be made payable to cash, convert the check to cash, and then he or an employee would deliver the cash to the defendant. These alleged monthly payments

[3]

totalled $87,500. The payments ended when BFI's parent firm brought the payments to the attention of the Securities and Exchange Commission.

Beeler testified that he first met Vann after the landfill vote of July 10, 1972, and that they became good friends. Further, he stated that he received campaign contributions from Vann of approximately $3,500 to $4,000 and loans of approximately $6,000. An attorney testified that he advised Beeler to amend his 1973 through 1975 tax returns to include the amounts Vann claimed to have given him. The attorney also testified that Beeler strongly objected to doing this, contending that he had not received the payments.

Defendant presents six issues on appeal:

(1) Whether there exists a fatal variance between the indictment and the proof introduced at trial;

(2) Whether the proof supports the charge in the indictment;

(3) Whether the government's closing argument deprived defendant of a fair trial;

(4) Whether the Court erred in admitting into evidence the joint income tax returns of defendant and his wife;

(5) Whether the Court erred in admitting into evidence hearsay testimony; and

(6) Whether the evidence preponderates against the verdict of guilty and in favor of the innocence of the defendant.

The Court bases its decision to reverse upon consideration of the first of these issues. A variance occurs when the proof introduced at trial differs materially from the facts alleged in the indictment. In contrast, an amendment involves a change, whether literal or in effect, in the terms of the indictment. Amendments have been held to be prejudicial *per se* while variances may be subject to the harmless error rule. *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969); *United*

[4]

States v. DeCavalcante, 440 F.2d 1264 (3d Cir. 1971). Variances which create "a substantial likelihood" that a defendant may have been "convicted of an offense other than that charged by the grand jury" constitute constructive amendments. Courts apply the prejudicial *per se* approach to such variances. *United States v. Sommers*, 496 F.2d 723, 744 (3d Cir. 1974).

The purposes underlying the rule against amendments and constructive amendments include notice to the defendant of the charges he will face at trial, notice to the court so that it may determine if the alleged facts are sufficient in law to support a conviction, prevention of further prosecution for the same offense, and finally, of "paramount importance," the assurance that a group of citizens independent of prosecutors or law enforcement officials have reviewed the allegations and determined that the case is worthy of being presented to a jury for a determination of the defendant's guilt or innocence. *United States v. Radetsky*, 535 F.2d 556, 562 (10th Cir. 1976). It appears that the first and last of these policies have been frustrated in this case.

While the indictment stated the dates and amounts of the monthly payments, it made no mention of the alleged July, 1972, agreement to exchange payments for Beeler's vote, nor did it mention the July, 1972, payments.[2] Defendant argues that the absence of these allegations from the indictment and the introduction of proof concerning them at trial constitutes a variance entitling him to a reversal of his conviction.[3]

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[2] The indictment is set forth in part in the appendix attached hereto.

[3] In his closing argument, the Assistant United States Attorney stated that Beeler had not been indicted for receiving payments in July, 1972, because these payments had "a questionable effect on interstate commerce." (Transcript of Evidence, Vol. V, 32).

As the indictment made no specific reference to the alleged July, 1972, extortionate agreement, defendant also contends that the indictment fails to charge him with a Hobbs Act violation. As we reverse, we need not consider this issue.

[5]

The introduction of evidence concerning offenses other than those charged is appropriate when intent, motive, or lack of mistake are in issue and when accompanied by cautionary instructions. Fed.R.Evid. 404(b); *United States v. Nemeth*, 430 F.2d 704 (6th Cir. 1970). The government does not claim, and it is certainly not the case, that evidence of the alleged July, 1972, payments and agreement was introduced to prove intent, motive, or lack of mistake.

The Fifth Amendment of the Constitution of the United States provides in part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

Relying on this provision, the Supreme Court has held that a court may not amend an indictment by striking out words as surplusage which may have formed the basis for one or more of the grand jurors to vote to indict. *Ex parte Bain*, 121 U.S. 1, 7 S.Ct. 781, 30 L.Ed. 849 (1887). In *Stirone v. United States*, 361 U.S. 212, 80 S.Ct. 270 (1960), the indictment charged the defendant under the Hobbs Act for interfering with sand brought into Pennsylvania for the manufacture of concrete. At trial the District Court, over defendant's objection,

> . . . permitted the Government to offer evidence of an effect on interstate commerce not only in sand brought into Pennsylvania from other States but also in interference with steel shipments from the steel plant in Pennsylvania into Michigan and Kentucky. Again over petitioner's objection the trial judge charged the jury that so far as the interstate commerce aspect of the case was concerned, Stirone's guilt could be rested either on a finding that (1) sand used to make the concrete "had been shipped from another state into Pennsylvania" or (2) "Mr. Rider's concrete was used for constructing a mill which would manufacture articles of steel to be shipped in interstate
>
> [6]
>
> commerce *** " from Pennsylvania into other States. *Id.* at 214, 80 S.Ct. at 271-272.

The Supreme Court, in reversing defendant's conviction, stated:

> . . . a court cannot permit a defendant to be tried on charges that are not made in the indictment against him. . . . Yet the court did permit that in this case. *Id.* at 217, 80 S.Ct. at 273.

Defense counsel here cannot be said to have waived objection to the variance by not raising the point at trial. *United States v. Pandilidis*, 524 F.2d 644, 647 (6th Cir. 1975). See also *United States v. Norris*, 281 U.S. 619, 50 S.Ct. 424 (1930); *United States v. Beard*, 436 F.2d 1084, 1087-1088 (5th Cir. 1971). But see *United States v. Garguilo*, 554 F.2d 59, 63 (2d Cir. 1977); *Jackson v. United States*, 359 F.2d 260, 264 (D.C. Cir. 1966). Nor can the trial court's instructions, which adhered to the indictment, be said to have cured the variance.[4] *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977).

As we reverse, we will address only one further point raised by appellant. Beeler testified that he borrowed money from a bank and from four individuals in order to pay the increased tax he owed as a result of amending his returns. Beeler's defense rested in part on the premise that such loans would have been unnecessary had Vann given him the alleged payments. In his closing argument, the Assistant United States Attorney argued forcefully that defendant's alleged creditors would not have corroborated his testimony had they been

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[4] The trial judge instructed the jury in part:

> You must try and consider the guilt or innocence of the defendant, John M. Beeler, on the crimes alleged in Counts One through Count 35. He is not being tried as such for the alleged $30,000.00 payments or any other payments. He is being tried, and you must consider his guilt or innocence only on the alleged payments which are set out in Counts One through 35 of this indictment. (Transcript of Evidence, Vol. V, 59.)

[7]

called as witnesses. The rule in this Circuit is that counsel must seek and obtain an advance ruling from the Court on the permissibility of arguing for an adverse inference to be drawn from the absence of witnesses.

United States v. Blakemore, 489 F.2d 193 (6th Cir. 1973). The government in the instant case clearly violated this rule.

The judgment is reversed for further proceedings not inconsistent herewith.

[8]

APPENDIX

In Count One the indictment charged:

"1. That on or about the 1st day of September, 1970, to the date of the filing of this indictment, JOHN M. BEELER has been a public official, that is, a member of the Board of County Commissioners of Knox County, Tennessee.

2. That at all times pertinent hereto, the Board of County Commissioners of Knox County had authority, among other things, to approve the use of all landfills in Knox County and to fix the charge, if any, for the use of said landfills.

3. That by order of the State of Tennessee, all then existing open-type landfills in Knox County were to be closed on or about July 1, 1972. As a result of said order, the Board of County Commissioners was seeking alternative landfill sites in or about the summer of 1972, and among those sites considered was a site located on Rutledge Pike in Knox County.

4. That at all times pertinent hereto, Browing-Ferris Industries of Knoxville, Inc., formerly known as Sanitary Disposal Company (hereinafter referred to as BFI-Knoxville, Inc.), was engaged in the waste

disposal business in Knox County and was a major user of landfills in Knox County. That for some time prior to on or about September 21, 1972, Robert Kenneth Vann was the owner of Sanitary Disposal Company. On or about September 21, 1972, Sanitary Disposal Company was purchased by Browning-Ferris Industries, Inc., and Robert Kenneth Vann remained as manager of BFI-Knoxville, Inc.

5. That at all times pertinent hereto, waste disposal equipment and supplies made and distributed by manufacturers, producers and distributors in various states, other than the State of Tennessee, were purchased and were to be purchased, and said equipment and supplies

[9]

were moved and were to be moved, in interstate commerce from said manufacturers, producers and distributors, outside the State of Tennessee for use by BFI-Knoxville, Inc. in the State of Tennessee.

6. That the defendant, JOHN M. BEELER, was at all times pertinent hereto reasonably understood by Robert Kenneth Vann, a representative of BFI-Knoxville, Inc., to have the power by virtue of his public office to influence legislation relating to the approval of landfills in Knox County that could adversely or beneficially affect BFI-Knoxville, Inc.

7. That on or about the 10th day of July, 1972, the Board of County Commissioners publicly approved a resolution authorizing the use of the landfill site located on Rutledge Pike. Said landfill site did not become fully operational until on or about January, 1973.

8. That on or about the 26th day of January, 1973, in the Eastern District of Tennessee, JOHN M. BEELER, the defendant, did knowingly, willfully, and unlawfully obstruct, delay, and affect commerce and the movement of waste disposal equipment and supplies in commerce, by extortion, in that the defendant would and did use his official position as a member of the Board of County Commissioners of Knox County, Tennessee, to unlawfully obtain $2,500.00, which money was not due to him or his office, from and through Robert Kenneth Vann, a representative of BFI-Knoxville, Inc., with the consent of said representative, such consent being induced under color of official right and by fear of economic loss.

In violation of Section 1951, Title 18, United States Code."

Counts two through 35 each incorporated by reference paragraphs one through seven of Count One and then charged defendant, in language similar to that in paragraph eight, with unlawfully obtaining $2,500 each month from February, 1973, through November, 1975.

INDICTMENT

(Filed March 21, 1979)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

UNITED STATES OF AMERICA	)	
v.	)	NO. CR-3-77-03
JOHN M. BEELER	)	

The Grand Jury charges:

1. That from on or about the 1st day of September, 1970, to on or about July 1, 1977, JOHN M. BEELER was a public official, that is, a member of the Knox County Board of Commissioners, Knox County, Tennessee.

2. That at all times pertinent hereto, the Knox County Board of Commissioners had authority, among other things, to approve the use of all landfills in Knox County.

3. That in conformance with the Tennessee Solid Waste Disposal Act, Tenn. Code Ann. 53-4301, through 4315, the Tennessee Department of Public Health ordered that all existing open garbage dumps in Knox County be closed on or about July 1, 1972. As a result of that order, the Knox County Board of Commissioners was seeking alternative landfill sites in or about the summer of 1972, and among those sites considered was one on Rutledge Pike in Knox County.

4. That at all times pertinent hereto, Browning-Ferris Industries of Knoxville, Inc., formerly known as

Sanitary Disposal Company (hereinafter referred to as BFI-Knoxville, Inc.), was engaged in the waste disposal business in Knox County and was a major user of landfills in Knox County. That for some time prior to on or about September 23, 1972, Robert Kenneth Vann was the owner of Sanitary Disposal Company. On or about September 23, 1972, Sanitary Disposal Company was purchased by Browning-Ferris Industries, Inc., and Robert Kenneth Vann remained as Manager of BFI-Knoxville, Inc.

5. That at all times pertinent hereto, waste disposal equipment and supplies made and distributed by manufacturers, producers and distributors in various states, other than the State of Tennessee, were

[2]

purchased and were to be purchased, and said equipment and supplies were moved and were to be moved, in interstate commerce from said manufacturers, producers and distributors, outside the State of Tennessee for use by Sanitary Disposal Company and thereafter BFI-Knoxville, Inc., in the State of Tennessee.

6. That the defendant, JOHN M. BEELER, was at all times pertinent hereto reasonably understood by Robert Kenneth Vann, owner of Sanitary Disposal Company and thereafter a representative of BFI-Knoxville, Inc., to have the power by virtue of his public office to influence legislation relating to the approval of the location of landfills in Knox County, that could adversely or beneficially affect Sanitary Disposal Company and thereafter BFI-Knoxville, Inc.

7. That on or about the 10th day of July, 1972, the Knox County Board of Commissioners approved a resolution authorizing the use of the landfill site located on Rutledge Pike.

8. That from on or about July 6, 1972, up to and including November 26, 1975, within the Eastern District of Tennessee, JOHN M. BEELER did willfully, knowingly and unlawfully obstruct, delay and affect interstate commerce by extortion in that defendant used his official position as a member of the Knox County Board of Commissioners, Knox County, Tennessee, to obtain approximately $117,500, which money was not due to him or his office from and through Robert Kenneth Vann, the owner of the Sanitary Disposal Company, and the representative of BFI-Knoxville, Inc., with the consent of said Robert Kenneth Vann, the payment of such amount having been induced by the said JOHN M. BEELER under color of official right and through the wrongful use of financial fear and economic injury.

In violation of Title 18, U.S.C., Section 1951.

/s/ JOHN H. CARY
UNITED STATES ATTORNEY

A TRUE BILL:

/s/ HAROLD CLINDER
FOREMAN

EXCERPT FROM DISTRICT COURT'S INSTRUCTIONS

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[932]

THE COURT: Ladies and gentlemen, good morning. I hope that after your long day yesterday that you were able to get a little rest and relaxation last night.

I have a few comments to make this morning in the form of supplemental instructions. I want to be sure that you take these instructions in the light of all of the other instructions which I have given to you and that you consider these instructions together with the previous instructions which I have given to you as a whole.

As I have said, you are not to single out any one point or sentence or instruction more than any of the others. You are to consider each instruction in light of all of the other instructions.

This case as has been said, is an important

[933]

case to both sides. If the jury is unable to agree upon a verdict, the case is left open and undecided.

Like all cases it has got to be disposed of sometime. In order to return a verdict in this case, each juror must agree to that verdict. In other words, as I have said already, your verdict must be unanimous. If you cannot agree unanimously, then, of course, you can't deliver a verdict. In your deliberations, the jurors have a duty to consult with one another and to deliberate with a view to each reaching an agreement, if it can be done, without violence to your individual judgment.

Although each juror must decide the case for himself or herself this should only be done after impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, a juror should not hesitate to re-examine his or her own views and change his or her opinion if convinced it is erroneous.

Each juror who finds himself or herself to be in the minority should reconsider his or her views in the light of the opinion of the jurors of the majority.

Conversely, each juror finding himself or herself in the majority should give equal consideration of the views of the minority.

No juror should surrender his or her

[934]

honest convictions as to the weight or effect of the evidence, for his or her fellow jurors or for the purpose simply of returning a verdict, but remember also that after full deliberations and consideration of all of the evidence, it is your duty to agree upon a verdict, if you can do so, without violating your individual judgment and conscience.

Remember too, if the evidence in the case fails to establish guilt beyond a reasonable doubt, the defendant should have your unanimous verdict of not guilty.

In order to make a decision more practicable the law imposes the burden of proof on one party or the other in all cases. In the present case the burden of proof is on the government to prove its case beyond a resonable doubt.

All right, Mr. Foreman, ladies and gentlemen, you may retire to continue your deliberations. The Marshal will provide you with the indictment and the exhibits. You may retire to continue your deliberations.

(Whereupon, the jury was retired at 9:21 A.M.)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
NORTHERN DIVISION

UNITED STATES OF AMERICA	)	
	)	
v.	)	Criminal No. 3-77-03
	)	
JOHN M. BEELER	)	

(Filed July 24, 1980)

MEMORANDUM AND ORDER

On July 17, 1980, my office received a letter from one of the jurors in the above case. The letter discussed, in general terms, the deliberative process which took place before the jury handed down its final verdict of guilty. The letter contained no allegations of extraneous or outside influence, or misconduct or incompetence on the part of any juror.[1]

Under Rule 606(b) of the Federal Rules of Evidence, the letter is clearly inadmissible in any proceedings concerning the validity of the jury's verdict. The reasoning behind this rule is succinctly stated in the Senate Judicial Committee Report on Rule 606(b), as follows:

> "Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the

jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors."

(Senate Report No. 93-1277).

The next question is what should be done with the letter and whether defense counsel should be allowed to conduct any further investigation into this matter. This Circuit has long recognized the inherent authority of trial judges to use their discretion in dealing with post-verdict problems of this kind. *United States v. Franke*, 511 F.2d 25, 37-38 (6th Cir. 1975) (. . .[I]t is well established that trial judges exercise their discretion in permitting post-verdict interrogation of jurors."); *United States v. Doe*, 508 F.2d 1226, 1232 (6th Cir. 1974), *cert. denied*, 420 U.S. 974 (1975).

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[1] See United States v. Moten, 582 F.2d 654, 664 (2d Cir. 1978).

[2]

In the present case, disclosure of the letter will serve no useful purpose. Considering the substantial publicity which this case has generated, the court believes that disclosure of the letter could well result in the very type of *post hoc* rationalizations, controversy, and juror harassment which Rule 606(b) is designed to avoid. In addition, the letter itself, as previously stated, suggests no avenues of investigation which might produce admissible evidence.

For these reasons, I have decided to file the letter in the court file under seal. In this manner, the defendant's rights on appeal will be preserved, the Sixth Circuit will have the letter available to it to examine if it chooses, and the policies behind Rule 606 will be best served.

Accordingly, it is this 21st day of July, 1980, by the United States District Court for the Eastern District of Tennessee,

ORDERED:

1. That the clerk of the court place the letter in question under seal in the court file in this case.

2. That a copy of this Memorandum and Order be mailed by the clerk's office to all counsel.

/s/ JAMES R. MILLER, JR.
James R. Miller, Jr.
United States District Judge
Specially Assigned

NO. 80-5253

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee*,	)	APPEAL from the United States District Court, Eastern District of Tennessee, Northern Division.
v.	)	
JOHN M. BEELER, *Defendant-Appellant*.	)	

Decided and Filed May 20, 1981.

Before: EDWARDS and WEICK, Circuit Judges and PHILLIPS, Senior Circuit Judge.

PER CURIAM. Beeler, a member of the Knox County Tennessee Board of Commissioners was convicted twice by juries in the district court of obstructing, delaying and affecting commerce by extortion in violation of 18 U.S.C. § 1951, known as the "Hobbs Act." His prior conviction was reversed by this court on the ground of variance between the indictment and the evidence. *United States v. Beeler*, 587 F.2d 340 (6th Cir. 1978). Upon remand, a new indictment was returned by the grand jury.

Upon appeal, seven issues are raised including variance which in our opinion has no merit. We are of the opinion that there was ample evidence to support the conviction; that the appellant was not denied a fair trial by the court's giving a correct *Allen* charge; that the indictment was not barred by the statute of limitations and there was no basis for dismissing the indictment for alleged prosecutorial vindictiveness.

[2]

Nor did the court err in denying a defense motion to inspect a post trial letter written by a juror to the judge.

The district judge inspected and sealed the letter for this court's inspection after concluding that it did not show that "extraneous prejudicial information" had been considered by the jury or that any "outside influence was improperly brought to bear upon any juror." We have inspected the sealed exhibit and agree. Fed. Rules of Evidence 606(b).

The judgment of conviction is affirmed.

DIRECTED SUPPLEMENTAL CHARGE OF THIRD CIRCUIT COURT OF APPEALS

(U. S. v. Fioravanti, 412 F.2d 407 (3rd Cir. 1919))

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[420]

* * *

"It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict."

STATUS OF ALLEN CHARGE AMONG CIRCUIT COURTS OF APPEAL

First Circuit - Adopted modified *Allen* charge requiring the onus of re-examination to be placed on the majority as well as the minority. The Court noted *Allen* should be used with great caution, and only when absolutely necessary. *United States v. Flannery*, 451 F.2d 880 (1st Cir. 1971)

Second Circuit - Approved *Allen* charge. The Court expressed that it has such grave doubts about *Allen* that it has given notice that it will not tolerate the slightest deviation from the approved language. The Court stated that it permitted *Allen* to stand only by the "barest margin". *United States v. Kenner*, 354 F.2d 780 (2nd Cir. 1965)

Third Circuit - *Allen* charge disapproved. Adopted charge from "Federal Jury Practice and Instruction", Mathes and Devitt, 1965, §79.01. *United States v. Fioravanti*, 412 F.2d 407 (3rd Cir. 1969)

Fourth Circuit - *Allen* charge disapproved. Adopted ABA Standard §5.4, plus proposal of the Judicial Conference of the United

States Courts. *United States v. Sawyers*, 423 F.2d 1335 (4th Cir. 1970)

Fifth Circuit - Approved *Allen* charge. The Court "deeply regretted being compelled to approve *Allen*, and did so only because bound by precedent." *United States v. Bailey*, 468 F.2d 652 (5th Cir. 1972); *United States v. Scruggs*, 583 F.2d 238 (5th Cir. 1978)

Sixth Circuit - Approved *Allen* charge, stating it approaches the limits beyond which a trial court should not venture in urging a jury to reach a verdict. *United States v. Harris*, 391 F.2d 348 (6th Cir. 1968)

Seventh Circuit - Disapproved *Allen* charge. Ordered the use of a specific charge patterned after ABA Standard §5.4. *United States v. Silvern*, 484 F.2d 879 (7th Cir. 1973).

Eighth Circuit - Has affirmed convictions based on *Allen* charge, but recommends use of ABA Standard §5.4. *United States v. Singletary*, 562 F.2d 1058 (8th Cir. 1977)

Ninth Circuit - Allows supplemental instruction that does not urge the minority to rethink their position. *Walsh v. United States*, 371 F.2d 135 (9th Cir. 1967)

Allen Charge Status Chart

Tenth Circuit - Has affirmed convictions based on *Allen* charge, but recommends use of ABA Standard §5.4. *Munroe v. United States*, 424 F.2d 243 (10th Cir. 1970)

District of Columbia Circuit - Disapproved *Allen* charge. Adopted ABA Standard §5.4. *United States v. Thomas*, 449 F.2d 1177 (D.C. Cir. 1971)

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No. 81-65

In the Supreme Court of the United States

OCTOBER TERM, 1980

JOHN M. BEELER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a fatal variance existed between the indictment and the proof at trial.

2. Whether petitioner's prosecution was barred by the statute of limitations.

3. Whether petitioner was denied a fair trial by the giving of a modified *Allen* instruction.

4. Whether the district court abused its discretion in refusing to disclose to defense counsel a post-trial letter it received from a juror.

5. Whether the evidence was sufficient to support petitioner's conviction under the Hobbs Act, 18 U.S.C. 1951.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A-19 to A-20) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 20, 1981. The petition for a writ of certiorari was filed on July 10, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Tennessee, petitioner was convicted on one count of extortion, in violation of the Hobbs Act, 18 U.S.C. 1951. He was sentenced to four years' imprisonment and fined $2,000. The court of appeals affirmed (Pet. App. A-19 to A-20).

The evidence showed that Robert Kenneth Vann was the owner and operator of the Sanitary Disposal Company (SDC), a collector of residential and commercial refuse in Knox County, Tennessee (A. 107-108).[1] In September 1972, Browning Ferris Industries, Inc. (BFI) acquired SDC (A. 108). Both before and after the merger into BFI, the disposal company purchased a substantial amount of materials from outside Tennessee (A. 109-110; Gov't Exhs. 1-1 through 1-65).

As a result of action taken by the Tennessee Legislature, two Knox County landfills used by SDC were to close on July 1, 1972 (A. 114). Two alternative landfill sites were proposed to the Knox County Board of Commissioners: one in Monroe County and another within Knox County (A. 116-117). Vann projected that the Monroe County site would be financially "disastrous" for his company (A. 118-120, 127).

From 1970 through 1977, petitioner was the Commissioner of Welfare for Knox County and, as such, held a seat on the county's Board of Commissioners. On July 4, 1972, petitioner and Vann met. Petitioner explained to Vann that he would need $30,000 to support the Knox County landfill site (A. 127). He further stated that he would require future payments of $2,500 per month for a period of two years and $1,500 per month for three years thereafter. Vann agreed to these demands (A. 129-130).

Vann paid petitioner $20,000 on July 6, 1972 (A. 132-134). Four days later, the three-member Board of Commissioners unanimously approved the Knox County site (A. 243-249). On July 11, Vann paid petitioner an additional $10,000, and once a month between January 1973 and November 1975 he paid petitioner $2,500 (A. 141). These

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[1] "A." refers to the joint appendix filed in the court of appeals.

monthly payments, which totalled $87,500, ended when BFI's parent firm brought the payments to the attention of the Securities and Exchange Commission (A. 272-276, 283-284).

ARGUMENT

1. Petitioner contends that a fatal variance existed between the indictment and the proof at trial (Pet. 18-21). Specifically, he argues that evidence of the July 4, 1972 agreement between himself and Vann was inadmissible because the agreement had not been alleged in the indictment. He relies on the court of appeals' decision reversing his first conviction in this case. *United States* v. *Beeler*, 587 F. 2d 340 (6th Cir. 1978). There, the court held that the government's failure to allege the 1972 agreement and the two 1972 payments in the indictment[2] precluded the introduction of proof concerning them at trial.

The present indictment alleged that "from on or about July 6, 1972, up to and including November 26, 1975" petitioner extorted $117,500 from Vann, SDC, and BFI (Pet. App. A-13). Accordingly, the indictment clearly charged the July 6 and July 11, 1972 payments. While the indictment did not expressly allege the July 4 agreement, the agreement was implicit in the allegations that the payments had been made and that petitioner had "induced" them "under color of official right and through the wrongful use of financial fear and economic injury" (*ibid.*).

The government, furthermore, was not required to allege the agreement in the indictment specifically, since actual agreement to make an extortionate payment is not an element of a Hobbs Act offense. The only two elements of the offense are (1) interference with commerce (2) by robbery or

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[2]The indictment charged petitioner only with receiving the 35 monthly payments of $2,500 from January 1973 through November 1975.

extortion. *Stirone* v. *United States*, 361 U.S. 212, 218 (1960).[3] "Extortion" is defined in Section 1951(b)(2) as "the obtaining of property * * * induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right." Accordingly, while evidence of the agreement was clearly admissible to show that the payments had been obtained "under color of official right," the failure to allege the agreement in the indictment was not error. See *Stirone* v. *United States, supra*, 361 U.S. at 218.

2. Vann's first two payments to petitioner occurred on July 6 and July 11, 1972, and the present indictment was returned on March 21, 1979. Petitioner contends that his conviction should be reversed because these payments fell outside the five-year limitation period of 18 U.S.C. 3282 (Pet. 22-24). His claim is without merit.

The courts of appeals that have addressed the issue have upheld indictments under the Hobbs Act that allege a single continuous plan of extortion involving multiple payments beginning outside the statute of limitations but continuing to a date within the statute. *United States* v. *Forszt*, No. 80-2392 (7th Cir. July 27, 1981), slip op. 5; *United States* v. *Hedman*, 630 F. 2d 1184, 1199 (7th Cir. 1980); *United States* v. *Provenzano*, 334 F. 2d 678, 684-685 (3d Cir.), cert. denied, 379 U.S. 947 (1964). Here, the indictment charged in one count that petitioner had engaged in a unitary plan of extortion involving multiple payments over several years. These payments continued through November 1975, well within the statute of limitations. Accordingly, the

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[3]The Hobbs Act provides in pertinent part (18 U.S.C. 1951(a)):

> Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion * * * shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

indictment was not defective.[4] Moreover, any danger that the jury convicted petitioner solely on the basis of time-barred July 1972 payments was vitiated by the court's instruction, in answer to a specific question from the jury, that in order to convict it must find that petitioner extorted approximately the entire amount alleged in the indictment (Tr. 922-923).[5]

3. Petitioner contends that the trial judge coerced the jury by giving a modified *Allen* instruction (Pet. App. A-14 to A-15) after the jury had deliberated for approximately 17½ hours and had reported itself "hopelessly deadlocked" (Pet. 9-15).

Although the court instructed the jury that this was "an important case to both sides," that if the jury was unable to reach a verdict "the case [would be] left open and undecided," and that "[l]ike all cases [this case] has got to be disposed of sometime," the court balanced this language by cautioning that "[n]o juror should surrender his or her honest convictions as to the weight or effect of the evidence, for his or her fellow jurors or for the purpose simply of returning a verdict * * *" (Pet. App. A-14 to A-15). The court emphasized that each juror, whether in the minority or majority, should reconsider his views in the light of the opinions of the other jurors (*ibid.*). The instruction thus reminded the jury of its task to reach a verdict if possible while providing ample protection against the danger that the jury would perceive the instruction as requiring a verdict or suggesting a particular verdict. See *Allen* v. *United States*, 164 U.S. 492, 501 (1896); *United States* v. *Dyba*, 554 F. 2d 417, 420-421 (10th Cir.), cert. denied, 434

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[4]Petitioner's argument that the indictment upon which he was initially tried did not toll the running of the statute of limitations does not aid his cause, since the present indictment, as we have shown, would not have been time-barred even if there had been no earlier indictment.

[5]"Tr." refers to the trial transcript.

U.S. 830 (1977); *Munroe* v. *United States*, 424 F. 2d 243, 245-247 (10th Cir. 1970).

Contrary to petitioner's assertion (Pet. 9), the decision in this case does not conflict with decisions in other circuits. As petitioner notes, some courts of appeals in the exercise of their supervisory powers have specified a particular charge to be given instead of the traditional *Allen* charge. See *United States* v. *Angiulo*, 485 F. 2d 37 (1st Cir. 1973); *United States* v. *Thomas*, 449 F. 2d 1177 (D.C. Cir. 1971) (en banc); *United States* v. *Fioravanti*, 412 F. 2d 407 (3d Cir.), cert. denied, 396 U.S. 837 (1969); *United States* v. *Brown*, 411 F. 2d 930 (7th Cir. 1969), cert. denied, 396 U.S. 1017 (1970). Naturally, the instruction here differs somewhat from the language specified by those courts. However, it does alleviate the primary concerns expressed by those courts in that it does not urge only the minority to reconsider its position nor state that the case must be retried if the jury fails to reach a verdict. See *United States* v. *Angiulo*, *supra*, 485 F. 2d at 39; *United States* v. *Thomas*, *supra*, 449 F. 2d at 1182-1183; *United States* v. *Fioravanti*, *supra*, 412 F. 2d at 417; *United States* v. *Brown*, *supra*, 411 F. 2d at 932-933. Accordingly, the finding of the court below that the instant supplemental charge was not impermissibly coercive does not establish a conflict with any other circuit.

Furthermore, such differences as there are among the circuits with regard to the proper instruction to be given to deadlocked juries are not of such a nature as to impair the equitable administration of federal criminal justice or to require the intervention of this Court for the purpose of establishing a uniform rule governing the precise wording of such instructions. This "*Allen* charge" issue has been repeatedly presented to the Court over the last decade, and review has been consistently denied. There is no reason for a different outcome in this case.

4. After the jury returned its verdict, a juror mailed a letter to the trial judge that discussed in general terms the jury's deliberative process (Pet. App. A-16). The judge entered an ex parte order (*id.* at A-16 to A-18) holding that under Fed. R. Evid. 606(b) the letter was inadmissible in any proceedings concerning the validity of the jury's verdict. He then placed the letter in the court file under seal, refusing to allow defense counsel to inspect it. Petitioner contends that the judge erred in failing to disclose the letter (Pet. 15-18).

Rule 606(b) broadly prohibits admission into evidence of any juror's statement concerning the jury's deliberations, except in those circumstances where the statement is relevant to the question "whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror." The district court found that the letter "contained no allegations of extraneous or outside influence, or misconduct or incompetence on the part of any juror" that would have entitled petitioner to challenge the validity of the verdict under Rule 606(b) (Pet. App. A-16). The court of appeals, after examining the letter, agreed (*id.* at A-20). The district court also found that the letter suggested "no avenues of investigation which might produce admissible evidence" (*id.* at A-17).[6] In short, the court carefully considered the letter and determined that its release to the parties would serve "no useful purpose" (*ibid.*).[7] In view

[6]Petitioner argues (Pet. 17) that the letter might have contained information reflecting the alleged coercive nature of the modified *Allen* charge given to the jury. As we have shown, however, the charge was altogether proper and noncoercive. Furthermore, under Rule 606(b), the letter would not have been admissible for purposes of challenging the charge.

[7]The district court correctly ruled that the policies of finality and privacy of jury deliberations underlying Rule 606(b) would best be served by sealing the letter, particularly in view of the substantial publicity this case had generated (Pet. App. A-17).

of these findings, and the fact that petitioner's right of appeal was fully protected by the inclusion of the letter under seal in the trial record, the decision to withhold the letter was not error.[8]

5. Petitioner contends tht the evidence was insufficient to support his conviction under the Hobbs Act, 18 U.S.C. 1951 (Pet. 21-22). This claim is without merit.

First, petitioner argues that the evidence fell short of establishing that when Vann made the $2,500 monthly payments he held a reasonable belief that petitioner's office included the ability to affect his rights. See *United States* v. *Harding*, 563 F. 2d 299, 306-307 (6th Cir. 1977), cert. denied, 434 U.S. 1062 (1978). He bases this argument on Vann's testimony that the landfill was under the control of the City of Knoxville and not that of the Knox County Board of Commissioners at the time of the payments (A. 190). However, petitioner overlooks the fact that the payments were made pursuant to an agreement entered into when the Board of Commissioners did have power and control over the landfill (A. 114-115). See *United States* v. *Forszt, supra*, slip op. 5 (Hobbs Act violated when public official "sell[s] his public trust while in office even though the last installment for the services rendered is to come after he leaves office"). Moreover, Vann testified that by making the payments he believed he would be in a favorable position when the landfill expired and the county was required to seek another landfill site (A. 160-161, 209-210).

Petitioner also argues that there was no evidence that the initial $30,000 in payments from Vann affected commerce within the meaning of the Hobbs Act (Pet. 22). Even if

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[8]Petitioner's reliance on *United States* v. *Moten*, 582 F. 2d 654 (2d Cir. 1978), does not aid his cause. Unlike here, the evidence withheld in *Moten* was relevant to a possible jury tampering effort and therefore would have been admissible under Rule 606(b) in any inquiry into the validity of the verdict.

petitioner were correct, however, his conviction would still be valid since he makes no claim that the monthly payments aggregating $87,500 did not affect commerce. In any event, there is evidence that the July 1972 payments affected interstate commerce. Although Vann testified that the $30,000 was paid out of his personal funds, the money was originally obtained by means of bank loans (A. 132, 137) which were partially repaid with funds generated by side operations of SDC (A. 163), which was shown to be involved in interstate commerce (A. 109-110; Gov't Exhs. 1-1 through 1-65). See *United States* v. *Rabbitt*, 583 F. 2d 1014, 1023 (8th Cir. 1978), cert. denied, 439 U.S. 1116 (1979). Finally, in order to establish the requisite nexus with interstate commerce it is not necessary for the government to show that the extorted payments depleted the funds of an interstate business, as petitioner apparently assumes. It is sufficient that the failure to yield to the extortionate demands might have caused some detriment to a business involved in interstate commerce. See *United States* v. *Kuta*, 518 F. 2d 947, 950-951 (7th Cir. 1975); *United States* v. *DeMet*, 486 F. 2d 816, 822 (7th Cir. 1973); *United States* v. *Hyde*, 448 F. 2d 815, 836, 837 (5th Cir. 1971). Here, Vann testified that location of the landfill in Monroe County would have been "disastrous" for SDC (A. 127).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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